Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. ~~77-766~~

SAMUEL G. ALBERT, M.D.,

Petitioner,

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME COURT OF THE STATE~~ Court of Appeals OF MICHIGAN

SAMUEL G. ALBERT
M.D., Petitioner,
In Pro Per
221 E. Coolidge
Ironwood, Michigan
AC 906-932-3406

Te: Clerk of the Supreme Court:

PLEASE TAKE NOTICE of my appearance on my own behalf, in pro per, as the Petitioner for a Writ of Certiorari.

PLEASE ENTER my appearance upon the records.

Samuel G. Albert, M.D.
Petitioner, In Pro Per
221 Coolidge Ave.
Ironwood, Michigan
Area Code 906-932-3406

Dated: November 28, 1977.

INDEX

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional Provisions & Statutes.	4
Statement	4
Reasons for Granting of Writ	12
Argument	15
Conclusion	23
Appendix A (Opinions, Orders, Judgment)	24
Appendix B Constitutional provisions and Statutes Involved	25

INDEX TO AUTHORITIES CITED

Page

Cases

Angle v. Chicago, St.P.M.& O.R.Co,.. 151 US 1,19..... 17

Berger v. United States, 255 US 22,36..... 20

Green v. McElroy, 360 US 373,492.... 17

National Labor Relations Board v. Ford Motor Co, 114 F2d 905,909 (CA6,1940) cert. den.312 US 689.. 17

Offutt v. United States,348 US 11... 12

Re Murchison, 349 US 133,136..... 12

Statutes

United States Code:
Vol.28, Sec.1257 (3)..... 3
Vol.28, Sec.2101 (c)..... 3
Vol.28, Sec.1651..... 3
Vol.28, Sec.2104..... 3

Constitution

United States Constitution:

Fifth Amendment..... 3,17

Fourteenth Amendment..... 3,17

Article III..... 3

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SAMUEL G. ALBERT, M.D.,

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FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME COURT~~ Court of Appeals OF MICHIGAN

Petitioner respectfully prays that a Writ of Certiorari issue to the Supreme Court of the State of Michigan to review the Order of Denial of Petitioner's Application for Rehearing entered by that Court on August 31, 1977 relating

to an Order of the Supreme Court on an Application for Leave to Appeal denying such leave on July 7, 1977 from an Order of the Court of Appeals Denying an Application for Rehearing dated February 14, 1977 of a decision and Opinion of the Court of Appeals dated January 7, 1977 affirming a circuit court judgment dated August 14, 1974 which had affirmed the probate court's denial petitioner's claim in part against the respondent for medical services rendered.

OPINIONS BELOW

The Opinion, Orders and Judgments are appended as provided for in the Rules of the Supreme Court, Rule 23.1 (i). The Orders of the Supreme Court and the Court of Appeals on Application for Rehearing are without Opinion. The Opinion

dated January 17, 1977 of the Court of Appeals for the State of Michigan is reported in the official reports as _ __ Mich. App. __, and is set forth in the appended Orders and Opinions, Appendix A.

JURISDICTION

This Court's jurisdiction is invoked, under and by virtue of Title 28, USC Sec. 1257 (3); Title 28 USC Sec. 2101 (c); Title 28 USC Sec. 1651; Title 28 USC Sec. 2104; Article III of the United States Constitution and Amendments, the Fifth and Fourteenth Amendments. Appendix B.

QUESTIONS PRESENTED

I

Was the Petitioner, in the light of and in consideration of all of the proceedings including judgments, orders and decisions, accorded due process of law ?

II

Was the judgment of a Probate Judge who Petitioner made a motion to disqualify and which motion was not heard and acknowledged prior to judgment rendered void, and all subsequent proceedings thereon and the enforcement thereof likewise void as being a denial of Petitioner's constitutional rights under the Fifth & Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The various constitutional provisions and statutes involved in this case are set out in Appendix B, infra.

STATEMENT

Petitioner is a medical doctor. He is one of the sons of George Albert, Deceased.

From and after the year 1943 Petitioner tended to all of the medical needs of the deceased, except where special referral was deemed necessary. The medical care was always at the request of the deceased. George Albert died testate on November 24, 1970. Approximately, ten months later the respondent was named the executor of the estate. The Executor was named by the assigned Probate Judge and both were from Marquette County. Petitioner had filed a claim with the Probate Court for payment by the Estate for medical services, special tests and procedures, room and board, and in addition thereto for special facilities and out of pocket expenses for drugs based upon an expressed agreement. The deceased during his lifetime made payments in accord with the agreement. This was true during the period of the coverage of his medical care and medical billing (December 22, 1969 to November 24, 1970 with the exception of

three days). Payments made by the decedent, in his lifetime, included the payment for special services and supplies, as needed and when supplied by Petitioner. The agreement called for the payment of $100.00 a day for medical services, and in addition that charged for the special services and supplies. The decedent paid with this understanding and insisted upon doing so as per his understanding with the Pwtitioner. The claim filed by the Petitioner against the estate was for $42,006.75 which was the net due by subtracting payments on general and special services that were already received by the petitioner in the sum of $26,876.12 from $73.882.87 the total amount claimed.

Petitioner, at a hearing on cliams noted on the record that the Probate Judge, assigned, did while engaginghim in a telephone conversation before the hearing, chastize and assess to the Petitioner a

"dissipation" of the estate. It was noted that the conversation via telephone had as its main concern, the question as to whether or not Petitioner's attorney, then engaged, was qualified to act on the behalf Petitioner. These remarks were noted upon the record at a hearing had on February 1, 1972. Petitioner contending that there was strong evidence shown and available that the said Judge had a pre-' disposition and had expressed hostility, and had evidenced bias and prejudice and personal embroilment did file a Motion to Disqualify him. Petitioner was promised that the matter would be noticed for a hearing pursuant to a practice permitting the Probate Judge from another county to schedule same to his convenience and in line with his schedule of appearance in the assigned county. The motion remains on file the court did not notice same for hearing. The Probate Judge continued to

conduct the Probate proceedings. Reference is made to your file number 76-851, October Term, 1976, a related case wherein Petitioner sought a Writ of Certiorari but was denied (pages 42-53) Further evidence of the issue is found in the transcripts of hearings had on February 1, 1972 and February 17 & 18, 1972.

The Probate Court established the Petitioner's gross claim in the amount of $33,500.00 for all services rendered at $100.00 per day. The amount already paid by the decedent, $26,876.12, during his lifetime, was credited against the amount established by the Court, $33,500.00, made the balance due to Petitioner the amount of $6,623.88. The Probate Court did not allow Petitioner's charges for special services, room and board, and out of pocket expenses for drugs. The Probate Judge gave no cognizance of the contract between

or the payments by the decedent for the special services, or the insistence of the decedent with his attorney in fact that the payment be made.

On March 10, 1972, the Probate Court rendered its opinion, set forth in full in Appendix A, unreported. Petitioner appealed to the Circuit Court. On August 15, 1974 the Circuit Court affirmed the findings and Judgment of the PROBATE court, this opinion is set forth in Appendix A, unreported. Judgment by the Circuit Court was entered on August 28, 1974, Appendix A. Petitioner took an appeal to the Court of Appeals. On January 7, 1977, the Court of Appeals rendered its opinion, set forth in Appendix A and reported in ___Mich. App.___affirming the Circuit Court's judgment affirming the Probate Court's denial of Petitioner's claim, in part. Petitioner was denied an application for rehearing on February 14, 1977, Appendix A (Order Denying Application)

Petitioner, thereafter, made Application for Leave to Appeal to Orders of the Court of Appeal. On July 7, 1977 the Supreme Court of Michigan ordered the Application to be denied as set forth in Appendix A, infra. Petitioner made Application in the Supreme Court for a Rehearing or a Reconsideration of its Order of Denial of Leave to Appeal. On August 3], 1977, the Supreme Court of Michigan Ordered the denial of the Motion for Reconsideration, as set forth in Appendix A, infra.

The federal question raised by the denial of due process became an issue and was raised in the Probate Court and is shown by the record of proceedings of February 1, 17 & 18, 1972 and by motion for the disqualification of Probate Judge, Michael De Fant; The Federal question was raised in the Circuit Court on a motion for rehearing. It was raised in the Court of Appeals. The issue was briefed for the

Supreme Court of Michigan. The federal question was timely and properly raised in the courts below. These courts were made cognizant of the federal issues. The federal question of the denial of due process related to adjudications upon no evidence or incompetent evidence, denial of equal treatment, equal protection, fair and unbiased tribunal and other privileges and immunities, failure to make determinations of the sufficiency of the evidence to support the findings, all of which it is stated and claimed denied Petitioner his "full" day in court. It is stated that the arbitrary determination that a federal issue is not preserved is itself a denial of due process. The due process claue as it relates, for example, to a fair and impartial tribunal has more than "at random" application.

REASONS FOR GRANTING WRIT

A. The lower Courts have, by their proceedings, decided an important federal question in a manner in conflict with the applicable decisions of this court. This is that due process is not denied by requiring that a litigant must try his case before a prejudiced judge so long as such prejudice has never been so acknowledged by him. In effect, the Courts, appealed from, can be heard to say that the question of disqualification may not be heard when made, and may not be heard or considered on appeal because it was not preserved. This is in direct conflict with the applied decisions of this Court in Offut v. United States, 348 US 11,14 that "justice must satisfy the appearance of justice," and Re: Murchison, 349 US 133,136, that " A fair trial in a fair tribunal is a basic requirement Of due process ****

'every procedure which would offer a possible temptation to the average man as a judge **** not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' " Although, the above, were criminal cases, due process of law is equally applicable to civil suits.

B. The lower Courts have, by their proceedings and determinations, decided that a prejudiced judge could fairly judge the credibility of the Petitioner and the competence of his or his witnesses testimony; could fairly remake a contract when he had previously chastized the Petitioner that his payments thereon were "dissipating" the estate. It means that the Courts condone a record made up by a judge we know to be prejudiced and which well could be infected with his prejudice and thereby cast unjust reflection on Petitioner.

C. The decision of the Court of Appeals, finding in its opinion, Appendix A. that it is not "...left with a definite and firm conviction that a mistake has been committed..." must be scrutinized by this Court, and some inquiry must be made of the entire record as to how a less firm convictioncould have been arrived at in the matter.

D. This Court must find upon upon its review that the Supreme Court of Michigan and escpecially, the Court of Appeals and the Circuit and Probate Courts, upon the face of the records, before them, denied Petitioner's substantive and procedural due process of law under the Fifth and Fourteenth Amendments of the US Constitution. This Court will find the federal question preserved and substantiated on the record. It will find upon the entire record that Petitioner did not waive or cancel the due process issues. It was this very issue

that caused the Petitioner to make his motion to disqualify. It was Petitioner's Contention throughout that the bias and the prejudice of the Judge that denied him a fair and impartial tribunal. It was this imposition that resulted in baseless findings re: the contract between the parties. A finding by this Court that the findings complained of were made by a biased and prejudiced judge, will, itself, render the judge's findings and judgments void. This Court upon this record cannot derive a judgment upon the false premise that the Probate Judge was a fair and impartial judge

ARGUMENT

Petitioner was entitled to but did not obtain a fair and unbiased tribunal. This observation was made in Petitioner's petition filed in a related matter in the October Term, 1976, your file number 76-851.

It is unfortunate that because of the time posture relating to the order and judgments pertaining to this matter and File No. 76-851 that both cases could not have been considered at the same time on a single petition for a writ of certiorari as permitted by Rule 23.5 of the Rules of the Supreme Court. Reference was made in 76-851 how the bias and prejudice of assigned, Probate Judge, Michael DeFant spilled over the record in that case. It is likewise, here and wherever the interests of Petitioner are concerned.

It is acknowledged, at the outset, that there is nothing in all of the errors of the lower courts relating to the law of contracts, in and of itself, that would trigger and maintain a federal question or a federal issue. Such is not contended. It is the contention of the

Petitioner, however, that those errors when they are the result of a biased and prejudiced tribunal raises and does maintain and preserve the federal issues of due process of law.

Petitioner, as a medical doctor, when practicing medicine holds a property right. Greene v. McElroy, 360 US 373,492. A right of action to recover claims is property. Angle v. Chicago, St.P.M & O. R. Co., 151 US 1,19.

The Fifth and Fourteenth Amendments relevantly provide: "No person***shall*** be deprived of***property without due process of law" The Fourteenth Amendment applying to the States is involved here. This was intended to exact from the States observance of basic liberties.

In National Labor Relations Board v. Ford Motor Co., 114 F2d 905,909 (CA6,1940) certiorari denied 312 US 689, the Court said:

"We may accept as fundemental the axiom that a trial by a biased judge is not in conformity with due process of law"

It follows, that a trial of a claims suit presided over by a biased judge would deprive petitioner of property without due process of law.

Would a hearing presided over by a Judge who --

a) PRIOR TO THE HEARINGS assesses to Petitioner and his claims that it was a dissipation of the estate;

b) ADMITTED he discussed the claim with a previously, self announced, biased Probate Judge who had disqualified himself;

c) THREATENED Petitioner with contempt for revealing his bias and his pre-adjudication of dissipation;

d) Refused to acknowledge or hear Petitioner's motion to disqualify him;

e) PRIOR TO THE HEARINGS accused Petitioner of falsehood and of putting words in his mouth;

f) Insisted upon taking over the questioning of witnesses and by leading questions deriving incompetent evidence to self-serve his bent of bias;

g) AFTER his judgments and orders disqualified and/or removed himself from the assignment without notice to Petitioner and during the pendency of Petitioner's unheard motion;

violate due process?

Petitioner respectfully urges that the answer to this question is "Yes."

The Probate Judge was,in effect, saying that the Petitioner lies. Thus, Petitioner, as to the instant litigation, from the moment of the recorded statements placed in a separate category from that of the other parties and in unequal position not contemplated or permissable in a fair trial before an impartial tribunal. No later than that moment the tribunal became partial. There is record evidence of his

bent of mind that would, could and did prevent or impede impartiality of judgment and when countenanced by reviewing courts it proves a heavy burden for the Petitioner to overcome. Upon the filing of his motion to disqualify the Petitioner was entitled to the exactment of the Judge's duty to refrain from proceeding further with the case. It is a violation of the Consitution to have a trial before a prejudiced judge. Since he removed himself by some means after the trial and his opinions and judgments, unfavorable to the Petitioner, and if prejudice did exist as alleged, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. The reviewing courts have found, as aptly described in Berger v. US, 255 US 22,36,that nothing can be more elusive of estimate or decision than a disposition of mind in which there is a Personal ingredient.

Who would seat a juror of the bent of mind exhibited by Judge DeFant? The test of bias or prejudice is the same for a judge as for a juror.

Hostility toward the Petitioner by Probate Judge DeFant is manifest throughout the transcript and in his opinion, Appendix A. infra. Decedent was depicted as a "captive" of the Petitioner. He labeled Petitioner as one who acted in a very arbitrary fashion. He also claimed that the Petitioner denied the deceased "tender, loving care" which the deceased needed. He charged the Petitioner with profiteering and over-reaching. He permitted the grossly irrelevant matter of income tax returns for prior years when such returns could by no means shed light on the issues. He made reference to allegations of fraud in a separate suit and claimed them to be veritable. Bias being the by product the highly prejudicial nature of same and its irrelevancy has

effected the record. His expressed sentiments found in the record appear to have motivated his opinion. How can a Judge who determines before hearing any testimony that petitioner has dissipated the estate believe himself to be qualified to sit on the very claim of the petitioner which the Judge believes will dissipate the estate. Such a predisposition is disqualifying, rendering his acts void. It should be noted that since the Judge, in question did later remove himself or deem himself disqualified from further sitting on his assignment, that, too, would render his previous judgments void.

His bent, also, is indicated in his redoing the contract of the parties. The record shows that he found an express contract limited to what he deemed to be the contract thus indicating that in his

opinion the expressed contract found by him to have existed was the result of a partial meeting of the minds. The full meeting of the minds was to result from the wishes of the respondent and the whim of the prejudiced judge. The record will show that John Albert, whose testimony was wrongfully used to dispel the inclusion of special services, tried vainly to set the record straight. Why didn't the Court pay heed if it was in search for the truth, if it were not for the evident fact that the truth would not satisfy the bent or satisfy the record replete with error to be sustained in the appellate courts.

+CONCLUSION+

For the foregoing reasons and argument the petition for a writ of certiorari should be granted.

Respectfully submitted,

Samuel G. Albert, M.D.
Petitioner, In Pro Per
221 Coolidge Ave.
Ironwood, Michigan

APPENDIX-A

PROOF OF SERVICE

STATE OF MICHIGAN
SS.
COUNTY OF IRON

SAMUEL G. ALBERT,M.D., first being duly sworn, deposes and says that he is the petitioner, herein, and does certify that three (3) true and exact copies of the within and foregoing Petition for Writ of Certiorari was served upon opposing counsel by placing same in the US Mail with sufficient postage to assure delivery to ROBERT BORDEAU, Esq., 128 Spring Street, Marquette, Michigan, Attorney for Respondent this 28th day of November, 1977 at Iron River, Michigan

Samuel G. Albert,M.D.

Subscribed and sworn
to this 28th day of
November, 1977.

Notary Public, Iron Co.
State of Michigan
My Comm: Expires: 12/27/80

APPENDIX-A

STATE OF MICHIGAN

THE PROBATE COURT FOR THE COUNTY OF GOGEBIC

****
In the Matter of the Estate of *
*
GEORGE ALBERT, *
*
Deceased. *
****

OPINION RE CLAIMS

Objections were filed to two of the claims filed in the above estate. They are the claims of Dr. Samuel G. Albert and Dr. Fred G. Albert in the amount of $47,006.75 and $2,190.48 respectively.

Dr. Samuel G. Albert is a general medical practioner with offices in Ironwood, Michigan. He was a son and residuary beneficiary of the decedent. His claim is for medical services alleged to have been provided decedent, and for drugs, medical supplies and for a private room alleged to have been furnished the decedent, the latter in the home of the claimant. The total claim for all charges amounted to $73,882.80, covering the period from December 22, 1969 to the date of death of the decedent on November 24, 1970. It is admitted that the amount of $26,876.12 was paid in eight amounts from May 15, 1970 to September 11, 1970, leaving a balance of the claim of $47,006.75. The claim is predicated on a claimed express contract acknowledged by the decedent and by his son, John Albert, who was acting as his attorney in fact during this period.

With respect to compensation for services rendered between near relatives, the general

rule appears to be that in the absence of an express contract, services rendered near relatives living in the same household as members of the family are presumed to be gratuitous. 7 ALR 2d 8. This particularly applies for services rendered by a child to a parent. Mason v. Dunbar, 43 Mich. 407. VanDyck Estate 288 Mich. 115.

In re Williams Estate 106 Mich. 490, it was stated with reference to this rule,

> ".....the claimant cannot recover in this case unless the proofs show that there was an express promise to pay for the services, but that the fact may be shown by facts and circumstances which satisfy the jury under the rule that I have given you in regard to the nature of the evidence that should be required, that the services were rendered in the expectation on the part of the claimant that she was to be compensated therefor, and in the expectation on the part of the deceased that she was to pay for them, and that that expectation rested upon an understanding of the parties that there was a legal liability and a legal obligation. I do not understand that it is necessary to find that there was any agreement to pay any specific wages, or any specific amount. If there was an agreement to pay,--if the jury find that there was a promise to pay, then it will be your duty to ascertain the amount from the evidence which the claimant is entitled to receive, and that amount is such sum as her services were reasonably worth." See Mich. citations 7 ALR 2d 49, 50.

Although it appears that services (or personal services) (or domestic services), rendered by one member of a family to another are presumed to be gratuitous, generally the courts do not set up any specific standards for determining just what type of services would be presumed to be gratuitous. Since the family relationship is the dominant consideration in determining the applicability of the presumption, it seems that the most desirable logical view would be that the presumptionwould be applicable only when it is shown that the services were such as members of a family usually and ordinarily rendered to each other. Synder v. Nixon, 188 Iowa 779; Wilson v. Elsee, 204 Iowa 857.

The view has been taken that the presumption of gratuity is not applicable as to services of an extraordinary nature, or, at least, is overcome upon proof of such services. Kellum v. Browning:ADMR 231 Ky. 308, 21 SW 2d 459. See generally 7 ALR 2d series.

The view has been expressed that to hold that services in managing a 32 room hotel to be gratuitously rendered would be a miscarrage of justice. Kramer's Estate 92 Pittsburgh Legislature 21.

It would appear, and the court would conclude, that the rendering of medical services by a son to a father would be extraordinary and unusual services for which the presumption would not lie.

In re Parker Estate 126 NYS 165, it was held that a daughter who is a practicing physician was entitled for services rendered in assisting in a surgical operation on her mother and where she provided medical care for an extended period of time.

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to make adequate decisions for himself, and that the agreement was either for the payment of medical services or his acquiescence in the mode of treatment was not an exercise of free choice and the he was in a sense a captive in the situation in which he found himself. He had suffered a stroke, his speech was more or less limited to "yes" and "no", he was not ambulatory and was generally in a very debilated state.

On the basis of the attorney in fact's testimony, we must question any understanding to pay for the special services over and above the $100 a day that was included in the claim. Secondly, there is certainly some question whether an attorney in fact under the circumstances in which the claimant depends on the consent and acquiescence of the decedent, had authority to negotiate such a contract as is claimed by the claimant. Under all the circumstances, we find that, as a matter of law, there was no express complete contract providing for payment of medical services beyond $100 a day. In view of the ambiguity of the alleged agreement, we find that there was no contract, express or implied to pay for the special services and supplies, particularly in view of the relationship of the parties who were certainly not dealing at arm's length with an exercise of free choice. There is certainly no question that the claimant rendered extensive medical services to the decedent and did provide substantially all the other related services set forth in his claim.

It would be a fair appraisal to state that the physical condition of the decedent during the period covered by the claim was such that hospitalization in a hospital was not only the normal alternative but also the best alternative. Why wasn't the decedent placed in the hospital? The claimant states

that no hospital could give him the care that he needed and certainly not the hospitals in the area. On the other hand, the testimony establishes that Dr. Samuel Albert had been barred from having access to hospitals in the area for a number of years. It does appear that one of the hospitals would have admitted the decedent under the care of the claimant, but the claimant refused to accept this opportunity. A fair appraisal would indicate that it was not the welfare of the patient that dictated the claimant's decision but rather his own personal problems and his own conflicts with the hospital authorities in the area. The claimant repeatedly states that he was motivated at all times by his love for his father and his desire to see that he received the best medical care possible; that at all times the welfare of the patient came first.

This does not measure up to the entire factual record. There is certainly in the treatment of the patient and of his other children, grounds to conclude that the claim went beyond the realm of the area of the doctor-patient relationship and acted in a very arbitrary, dictatorial fashion. The decedent was dying, and, as someone stated, this patient needed tender loving care, and this the patient did not get. Most of his children were barred from having any contact with him. The decedent was isolated and it is obvious that in many instances the motivation of the claimant was not the welfare of the patient but his own problems and his own needs. He claims his filial love was the primary motivation. It is hard to reconcile a claim of filial love with the transaction that the claimant was involved in during the last few days of decedent's life. Decedent was dying and obviously claimant as his physician must have known that and yet he involved himself in a transaction with his brother, Fred Albert, who was then acting under the

color of power of attorney to sell certain securities belonging to decedent jointly with other children. The securities were sold within a day or two of the death of the decedent and the proceeds were given to the claimant as a loan which is reflected by a promissory note payable in ten years without interest.

This transaction raises serious questions as to the legality and good faith of the whole transaction. This transaction raises another question bearing on the good faith of the claimant. At or about the date of death, according to his claim, he was entitled to approximately $47,000. The borrowing of approximately $35,000 from the decedent under all the circumstances is not satisfactorily explained if it is true that at the time the decedent was indebted to him in the amount of$47,000. Not only the good faith of the claimant is at issue also that of his supporting witness, Dr. Fred Albert, who acquiesced in the transaction, who handled the mechanics of the transaction so that a loan could be mde to the claimant which was in turn applied on a promissory note at a bank in Austin, Minnesota, on which both the claimant and the attorney in fact were co-signers..

Let us look at another facet. Dr. Samuel Albert claims that on or about March 7, 1970, he concluded that the decedent could not be adequately treated in his own home and that he could better take care of him if he removed the patient to the doctor's home which he did on March 7, 1970. The patient remained in the claimant's home from March 7, 1970 through May 9, 1970 and from May 13, 1970 through November 24, 1970 the date of death for which he made a charge of $45 a day which came to a total of $11,700. The record clearly establishes that this was not an actual out-of-pocket cost to the claimant but it can be fairly inferred that the charge was predicated on the normal hospital charge in the area. This one aspect alone indicates

that the claimant was not only trying to get payment for his services and out-of-pocket money for his medical supplies but that he was, in fact, trying to make a profit. In most of the other services that he rendered he was assisted by others for which no special claim was made. They are obviously included in his own claim, so that it can be said that the claimant was not actually limiting his charge to his time and his supplies which were out-of-pocket. It indicates another act of over-reaching which is not consistent with his claim that he was at all times motivated by the interest and welfare of his patient. Claimant states that his charges were in measure predicated upon the loss of private practice incident to the care necessary to be rendered to the decedent. Yet his income tax returns indicated that from 1961 to 1968 his gross income varied between $32,000 and $45,000; that his net income ranged between $10,000 and $21,000 during that period. He explains this by stating that he was devoting very little time during this period to private practice and that he was h-ndicapped by the fact that he was barred access to the hospitals. In 1959, he showed an income of $79,000 with a net income of approximately $40,000.

In 1969 his gross medical income was $35,608.81--the net was $16,319.81. In 1970, which presumably includes the $26,876.12 received from the father, his gross income was $65,613.32 with a net income of $42,416.94 which, incidently, is the highest net income for approximately ten years.

We find that we cannot give great weight to the claim of Dr. Samuel Albert that in rendering services to his father that he necessarily suffered a substantial or significent loss of income that he would not have suffered had he not been treating his father.

We cannot accept the claimant's rational that the care in the hospital would be less

adequate than that he provided. It would appear that a hospital where nurses and other employees are constantly on duty, would provide better supervision during night-time hours than the communicating system that claimant had set up where he would depend on hearing the breathing sounds of his father in claimant's bedroom, on the grounds that he would be constantly on the alert to the father's breathing even during the claimant's sleeping hours. We must find that all that he did for his father was not solely motivated by the welfare of the patient;

we find that he was motivated by other factors arising from his own personality, his own problems, and conflicts with his own brothers and sisters.

His chief supporting witness is his brother, Dr. Fred Albert. From the entire testimony we can only conclude that this witness was not entirely unbiased.

The testimony of Dr. James Albert seems to be more objective than the testimony of other witnesses. He states that his father did not want to go to Dr. Samuel Albert's home. He states that his father wanted to to go to a hospital and infers that Dr. Samuel Albert was fearful of the influence the other children might have on the father, particularly, LaMese.

It can be fairly inferred that the efforts of the claimant to isolate the father from his other children was not entirely motivated by medical reasons. We cannot , in good conscience, allow the claim of Dr. Samuel Albert in the amount claimed. It is true that the claimant rendered extensive medical services to his father, undoubtedly far beyond what he would have rendered to a private patient and this must be taken into consideration. Taking all the testimony with all it's

nuances, with all its complexes, with all the motivations, it would be a miscarriage of justice to allow the amount claimed.

Stretching our credulity to its limits, we reluctantly allow the claimant the rate of $100 a day from December 22, 1969, through May 9, 1970, and from May 13,1970, through November 24, 1970, in the amount of $35,000. Against this we will credit the amount of $26,876.12 which reflects the payments actually received. The amount of the total claim hereby disallowed is $40,382.80. The amount allowed and due to the claimant is $6,623.88.

Dr. Fred G. Albert, son and residuary beneficiary of the decedent, who is also a doctor of podiatry, filed a claim against the estate in the amount of $2,190.48, to which the administrator c.t.a., and interested parties, filed objections.

During his father's illness, claimant states that he purchased and furnished for his father certain medical supplies and equipment which are listed in his claim in the total amount of $975.48. There is no satisfactory proofthat these supplies were not in fact furnished, and the Court finds that there is an implied promise to pay same.

However, some of the equipment was kept by the claimant, particularly a hydrotherapy unit which cost $297.50. The Court finds that the amount of $200 should be credited against the claim for this item, reducing the claim for the medical supplies and equipment to $775.48.

Sometime in October of 1970, the claimant, at least under color of title, was appointed by the decedent to be his attorney in fact and apparently acted under this power of attorney until the day of death and even afterwards when it could been legally assumed that the power of attorney had terminated. The claim includes an item of 2600 miles at 15¢ per mile, which is hereby allowed in the amount of $390.00.

During his period as attorney in fact, claimant claims he was away from his practice a total of 5½ days and is entitled to the sum of $150.00 a day which represents his loss from his practice. We cannot allow this item of $825.00 in full for several reasons. One, the measure of his loss from his professional practice is not the measure of his worth as attorney in fact. Two, much of the time that he claims to have expended, was with respect to the highly questionable transaction of the sale of the securities belonging to the decedent jointly with others. The proceeds of which were eventually applied to pay a promissory note in which he was the joint maker with Dr. Samuel G. Albert. In the light of all the circumstances, we feel that an allowance of $25.00 a day is more than ample. Accordingly, this item for services rendered is allowed in the amount of $137.50. It is the finding of the Court that the amount of $887.50 should be disallowed from the amount claimed and the claim of Dr. Fred G. Albert is allowed in the amount of $1302.98.

An Order Allowing Claims will be submitted according to this opinion.

Dated: March 10, 1972

Michael F. DeFant

Michael F. DeFant,
Acting Judge of Probate

APPENDIX-A

OPINION AND DECISION ON APPEAL
(Affirming the Probate Court)

(Filed August 15, 1974)

(File No. 72-53 AV.)

Present: William F. Hood, Circuit Judge

(Prefacing and portions unessential to the Petition are omitted)
(Rule 23.1 (J))

The burden was thus cast upon claimant to establish that any amendment to an existing contract or confirmation of the terms of the terms of the existing contract was made under circumstances involving no breach of fiduciary duty, and that claimant did not take advantage of his dominant position in any way for his own benefit; that the amendment or confirmation was made in an atmosphere bearing the "earmarks" of arm's length bargaining and were indeed the exercise of free and voluntary will of the father dependent of any pressure or improper influence by the claimant.

Under the circumstances, it cannot be said that the trial court's holding that this burden has not been sustained was clearly erroneous.

The findings and judgment of the trial court are, therefore, affirmed.

APPENDIX-A

JUDGMENT ON APPEAL FROM PROBATE COURT
(Affirming Probate Court)

(Filed August 28, 1974)

(File No. 72-53)

At a session of said Court, held in the Courthouse, in the City of Bessemer, Michigan, on the 28th day of August, 1974

Present: Hon. William F. Hood
Circuit Judge

The above entitled cause having come on to be heard on appeal from the Probate Court and the Court having filed its opinion and decision on appeal wherein the Court concludes that the finding and judgment of the trial court are not in error and should, therefore, be affirmed.

IT IS HEREBY ORDERED AND ADJUDGED that the finding and judgment of the Probate Court for the County of Gogebic are hereby affirmed, together with costs and charges to be taxed by the appellee against the appellant.

APPENDIX-A

OPINION OF THE COURT OF APPEALS
(Affirming Judgment of Circuit Court)

(Filed January 7,1977)

File No. 22909

Before: M.J. Kelly, Presiding Judge
J.H. Gillis, W.P. Hampton
Judges

(Prefacing and portions unessential to the Petition are omitted)
(Rule 23.1 (J)

In the present case, each side offered conflicting testimony. The probate court found an agreement for $100.00 per day and therefore, found that plaintiff had carried the burden of proof by the preponderance of the evidence that an agreement existed between father and son. However, as to the other alleged terms of the agreement, the probate court found that the plaintiff did not carry his burden of proof and held the agreement was limited to $100 per day. The probate court could properly choose to disbelieve the plaintiff and his witnesses concerning some of the terms of the agreement; especially where certain terms were arguably recollected after a change of circumstances. Although, the probate court's opinion lacked consistency at times, neither its findings of fact nor its decision was clearly erroneous. After a review of the entire record, we are not left with a definite and firm conviction that a mistake has beencommitted. Tuttle v. Department of State Highways, 397 Mich 44, 46 243 NW2d 244 (1976).

Opinion (cont.)

Plaintiff's second assignment of error that he was denied substantive and procedural due process by the alleged bias and prejudice of the probate judge is notpreserved for review.

Therefore, the circuit court's judgment affirming the probate court's denial of plaintiff's claim in part is affirmed.

APPENDIX-A

ORDER OF THE COURT OF APPEALS
(Denying Rehearing)

(Filed February 14,1977)

No. 22909

At a session of the Court of Appeals of the State of Michigan held in the Court of Appeals in the City of Detroit on the 9th day of February, 1977.

Present: The Hon. Michael J. Kelly
Presiding Judge
John H. Gillis
William P. Hampton,
Judges

In this cause on application for rehearing is filed by appellant, and nothing in opposition thereto having been received, and due consideration thereof having been had by the Court.

It is Ordered that the application for rehearing filed by the appellant be, and the same is hereby Denied.

APPENDIX-A

ORDER OF THE SUPREME COURT
(Denying Application)

(Filed July 7,1977)

CR No. 19-343

At a session of the Supreme Court of the State of Michigan, held in the Supreme Court Room in the City of Lansing, on the 7th day of July, 1977.

Present: The Hon. Thomas G. Kavanagh
Chief Justice
G. Mennen Williams
Charles L. Levin
Mary S. Coleman
John W. Fitzgerald
James L. Ryan
Blair Moody, Jr.
Associate Justices

On Order of the Court, the delayed application, in pro per, for leave to appeal is considered, and it is DENIED, because the appellant has failed to persuade the Court that the question presented should be reviewed by this Court.

APPENDIX-A

ORDER OF THE SUPREME COURT
(Denying Rehearing)

(Filed August 31, 1977)

CR No. 19-343

At a session of the Supreme Court of the State of Michigan,held in the Supreme Court Room in the City of Lansing, on the 31st day of August, 1977.

Present: The Hon. Thomas G. Kavanagh
Chief Justice
G. Mennen Williams
Charles L. Levin
Mary S. Coleman
John W. Fitzgerald
James L. Ryan
Blair Moody JR.
Associate Justices

On the Order of the Court, plaintiff-appellant's application in propria persona for rehearing is denied because GCR 1963, 864.4, provides for the filing of such application only in opinion cases. Plaintiff-appellant's application is treated as a motion for reconsideration of this Court's order of July 7, 1977, and the motion is denied because it does not apear to the Court that said Order was entered erroneously.

APPENDIX-B

APPENDIX-B

Title 28 Sec. 1257 (3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari..where any title, right, privilege or immunity is specially set up or claimed under the Constitution..or authority under the United States.

Title 28 Sec. 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28 Sec. 2101 (c)

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the judgment and decree..

Title 28 Sec. 2104

An appeal to the Supreme Court from a State court shall be taken in the same manner and under the regulations, and shall have the same effect as if the judgment or decree appealed from had been rendered in a court of the United States.

United States Consitution

Article III created a Supreme Court vested with original jurisdiction and appellate jurisdiction....The Supreme Court has always had authority..to review a final judgment or decree of the highest court of state where ..the judgment turns upon a substantial federal question. (Landmark case, Martin v. Hunter's Lessee (1816) 1 Wheaton 304, 4 L.Ed 97

Fourteenth Amendment

No person shall...be deprived of life, liberty, or property, without due process of law..

Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. ~~77-765~~ 77-766

SAMUEL G. ALBERT, M.D.,
Petitioner,

vs.

FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

RESPONDENT'S BRIEF IN OPPOSITION

KENDRICKS, BORDEAU, CASSELMAN AND ADAMINI, P.C.

By: ROBERT M. BORDEAU

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Marquette, Michigan 49855

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
ARGUMENT	2-3
CONCLUSION	4
APPENDIX A — Opinion of the Michigan Court of Appeals	5-8
APPENDIX B — Claim of Appeal	9

CASE CITATIONS

Henry v *State of Mississippi*, 379 US 443, 448; 85 S Ct 564, 567 (1965)	3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. --------

SAMUEL G. ALBERT, M.D.,
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FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the Probate Court and Circuit Court for Gogebic County are unreported (Petitioner's Appendix A).

The opinion of the Court of Appeals of the State of Michigan, as yet unreported, is set forth in Respondent's Appendix A. The Supreme Court of the State of Michigan denied leave to appeal with opinion (Petitioner's Appendix A).

JURISDICTION

1. The order of the Supreme Court of the State of Michigan denying leave to appeal was entered without opinion on July 7, 1977 (Petitioner's Appendix A).

2. An application for rehearing before the Michigan Supreme Court was denied on August 31, 1977, because Michigan General Court Rules 1963, 864.4, provides for the filing of such application only in opinion cases (Petitioner's Appendix A).

3. Respondent contends that the petition for writ of certiorari should have been filed within ninety days from the entry of the order of the Michigan Supreme Court dated July 7, 1977; and, therefore, said petition was not timely filed with this Court.

STATEMENT

The facts of the case are stated fully in the opinion of the Court of Appeals of Michigan (Respondent's Appendix A).

ARGUMENT

Respondent opposes the Petition for Writ of Certiorari for the reason that this controversy does not involve any issue arising under the Federal Constitution or statutes of the United States. The state court decisions rested solely on independent and adequate state grounds, and federal questions were neither raised nor decided.

Inasmuch as no substantial federal question is involved in this case, it seems almost superfluous to point out that the question now alleged was never properly presented be-

low. Petitioner claims that he was denied substantive and procedural due process because the probate judge was bias and partial. However, this issue was not a basis for his claim of appeal to the Gogebic County Circuit Court (Respondent's Appendix B), and was raised for the first time in the Michigan Court of Appeals (Respondent's Appendix A). In its opinion, the Court of Appeals held: "Plaintiff's second assignment of error that he was denied substantive and procedural due process by the alleged bias and prejudice of the probate court is not preserved for review." The Court of Appeals decision rested solely on issues of state law, and it is clear that no federal question was decided. Furthermore, Respondent would submit that the state grounds were sufficient to support the state court judgments and that a decision on the federal question of due process was unnecessary to the court's determination of the cause. This court has often held that it will decline to review state court judgments which rested on independent and adequate state grounds, even where these judgments also decide federal questions. This principle has been applied not only in cases involving state substantive grounds, but also in cases involving state procedural grounds. *Henry* v *State of Mississippi*, 379 US 443, 448; 85 S Ct 564, 567 (1965).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KENDRICKS, BORDEAU, CASSELMAN AND ADAMINI, P.C.

By: ROBERT M. BORDEAU

128 West Spring Street
Marquette, Michigan 49855

RESPONDENT'S APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

SAMUEL G. ALBERT,
Plaintiff-Appellant,
v.
FIRST NATIONAL BANK & TRUST CO. OF MARQUETTE,
Defendant-Appellee.

No. 22909

OPINION

(Filed January 7, 1977)

Before: M. J. Kelly, P.J., and J. H. Gillis and W. P. Hampton, JJ.

Per Curiam

Plaintiff appeals by leave granted from the circuit court's judgment, which affirmed the probate court's denial of plaintiff's claim in part against the Estate of George Albert for medical services rendered.

The facts as stipulated to by the parties can be summarized as follows:[1] George Albert of Ironwood, Michigan died testate after a prolonged illness on November 24, 1970. In September, 1971 the First National Bank and Trust Company of Marquette, Michigan was appointed administrator c.t.a. of the estate. Plaintiff, the son of the decedent and a medical doctor, thereafter filed a claim with the probate court for medical services rendered on behalf of

the decedent from December 22, 1969 to November 24, 1970.[2] The claim against the estate was for $42,006.75 which was derived by subtracting $26,876.12, representing payments received to date, from $73,882.87, the total amount claimed. The probate court established plaintiff's gross claim in the amount of $33,500 for all services rendered at $100 per day. The $26,876.12, representing the payments received by plaintiff during decedent's lifetime was credited against the $33,500, which resulted in a balance due to plaintiff of $6,623.88. The probate court disallowed plaintiff's claim for specific tests and services over $100 per day, room and board at $45 per day and out-of-pocket expenses for drugs. The circuit court on appeal, affirmed the decision of the probate court.

Plaintiff contends that the circuit court's order of judgment affirming the findings of the probate court is against the great weight of the evidence and contrary to the facts and therefore, clearly erroneous. Plaintiff claims that a verbal agreement was entered into between him and his father and that the terms of this agreement were that plaintiff was to be paid $100 per day for medical services rendered plus all specific amounts for special services[3] and $45 per day for room and board. The theory of plaintiff's claim was express contract. The probate court found an agreement for payment of medical services at $100 per day, but found no agreement for payment of special services and supplies above $100 per day. The circuit court after reviewing the facts and testimony, concluded that the trial court's finding of no contract for payment beyond $100 per day was not clearly erroneous.

In reviewing an action tried upon the facts without a jury, GCR 1963, 517.1 provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appeared before it."

Furthermore, it is a "recognized rule of law that where a trial court hears sharply conflicting testimony the court may properly choose which testimony it disbelieves" and "an appellate court ought not to disturb the lower court's decision of whom to believe." *First National Bank & Trust Co* v *Albert*, 66 Mich App 252, 265; 238 NW2d 827 (1975).

In the present case, each side offered conflicting testimony. The probate court found an agreement for $100 per day and therefore, found that plaintiff had carried the burden of proof by the preponderance of the evidence that an agreement existed between father and son. However, as to the other alleged terms of the agreement, the probate court found that plaintiff did not carry his burden of proof and held the agreement was limited to $100 per day. The probate court could properly choose to disbelieve the plaintiff and his witnesses concerning some of the terms of the agreement; especially where certain terms were arguably recollected after a change in circumstances. Although, the probate court's opinion lacked consistency at times, neither its findings of fact nor its decision was clearly erroneous. After a review of the entire record, we are not left with a definite and firm conviction that a mistake has been committed. *Tuttle* v *Department of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976).

Plaintiff's second assignment of error that he was denied substantive and procedural due process by the alleged bias and prejudice of the probate judge is not preserved for review.

Therefore, the circuit court's judgment affirming the probate court's denial of plaintiff's claim in part is affirmed.

FOOTNOTES

[1] A more detailed description of the factual circumstances surrounding the present case appears in *First National Bank & Trust Co* v *Albert*, 66 Mich App 252; 238 NW2d 827 (1975).

[2] Medical services were rendered on behalf of decedent from December 22, 1969 to November 24, 1970 except for a three day period of May 10-12, 1970.

[3] These amounts were set by plaintiff as his charges. Some were for tests and outside services performed by others.

RESPONDENT'S APPENDIX B

STATE OF MICHIGAN — THE PROBATE COURT FOR THE COUNTY OF GOGEBIC

IN THE MATTER OF THE ESTATE OF GEORGE ALBERT, DECEASED.

CLAIM OF APPEAL

I, James M. Collins, respectfully represent that I am an attorney at law in the City of Negaunee and represent Samuel G. Albert, M.D., and that he is aggrieved by a certain order allowing claims by the acting Probate Judge, Michael F. DeFant, dated March 16, 1972.

WHEREFORE, on behalf of Samuel G. Albert, M.D., I hereby claim an appeal from said order for the following reasons and on the following grounds:

1. That the findings of the Probate Court are contrary to the facts and testimony presented in this cause.

2. That the said Dr. Albert had entered into a contract with his father for medical services and the testimony established that his father ordered his son paid for the services in accordance with the billings submitted by Dr. Albert.

3. That the Probate Court in this cause has refused to allow the same.

(s) James M. Collins

Dated: May 11, 1972.